BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

NEVIL L. GUMM	)	
Claimant	)	
VS.	)	
	)	Docket No. 216,993
DUKE MANUFACTURING CO.	)	
Respondent	)	
AND	)	
	)	
LUMBERMENS MUTUAL CASUALTY COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the Award dated May 14, 1998, entered by Administrative Law Judge Julie A. N. Sample. The Appeals Board heard oral argument on November 17, 1998.

APPEARANCES

Gary L. Jordan of Ottawa, Kansas, appeared for the claimant. Mark E. Kolich of Kansas City, Kansas, appeared for the respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

After finding an 83 percent task loss and a 31 percent wage loss, the Judge awarded claimant a 57 percent permanent partial general disability.

Respondent and its insurance carrier contend claimant's wage loss is only 20 percent. They argue that overtime and fringe benefit items should not be considered when computing the difference in pre- and post-injury wages. Also, they contend that claimant's post-injury average weekly wage should be computed using $8.50 per hour

because that is the highest hourly rate he earned while working for another employer before he moved from the night to day shift.

Claimant, on the other hand, contends the Judge properly compared the pre- and post-injury wages, which included overtime and fringe benefits.

The only issues before the Appeals Board on this appeal are (1) the difference between claimant's pre-injury and post-injury wages and (2) its affect upon claimant's permanent partial general disability.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

(1) Nevil L. Gumm injured his back while working as a spot-welder for Duke Manufacturing Company. The parties stipulated that the injury occurred through a series of accidents through June 28, 1996.

(2) Mr. Gumm sought and obtained medical treatment for his back, which included medication, physical therapy, and work hardening. On several occasions, he attempted to return to work and perform his welding job, but each attempt ended unsuccessfully.

(3) Mr. Gumm's last day of work for Duke was March 20, 1997. Sometime after that date, Duke ceased business operations. At no time did the company ever offer to accommodate Mr. Gumm's back injury by providing light duty work.

(4) After terminating with Duke, Mr. Gumm first obtained employment at the Dillard's warehouse in Olathe, Kansas, earning $6 per hour. Next, he obtained employment with DOT Label in Gardner, Kansas. For approximately two weeks, Mr. Gumm earned $8.50 per hour while training for a night shift position. But his hourly rate decreased to $7.50 per hour when he bid and obtained a day shift position that became available.

(5) The parties stipulated that Mr. Gumm's pre-injury average weekly wage, including overtime, was $429.84. And the value of additional compensation items was $24.80 per week.

(6) When DOT's payroll manager, Patricia Gable, testified in April 1998, Mr. Gumm was earning $7.50 per hour working 40 hours per week. She testified that in May 1998 Mr. Gumm would qualify for an insurance benefit that would cost DOT $6.78 per month. Additionally, at Ms. Gable's deposition, Duke's counsel introduced an exhibit that indicated Mr. Gumm had earned a total of $171.90, or a weekly average of $12.28, in overtime wages during the 14-week period that he had worked for DOT as of that time.

(7) Using the information provided by Ms. Gable, Mr. Gumm has a post-injury average weekly wage of $313.84, which is comprised of $300 ($7.50 x 40 hrs.) straight-time, $12.28 in overtime, and $1.56 ($6.78 x 12 mos. ÷ 52) in fringe benefits.

(8) After leaving Duke's employment, Mr. Gumm made a good faith effort to find appropriate employment. In October 1997, Mr. Gumm found employment with Dillards. In January 1998, he obtained a better paying job with DOT.

(9) As a result of the back injury, Mr. Gumm has lost the ability to perform 83 percent of the work tasks that he performed in the 15-year period before the June 28, 1996, accident. That finding is based upon the testimonies of board-certified surgeons Edward J. Prostic, M.D., and Sergio Delgado, M.D.

CONCLUSIONS OF LAW

(1) The Award should be affirmed.

(2) Because his is an "unscheduled" injury, Mr. Gumm's entitlement to permanent partial general disability benefits is governed by K.S.A. 44-510e, which provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

That statute, however, must be read in light of Foulk[1] and Copeland[2]. In Foulk, the Court held that a worker could not avoid the presumption of no work disability contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job that pays a comparable wage that the employer offers. In Copeland, the Court held, for purposes of

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[1] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[2] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

the wage loss prong of K.S.A. 44-510e, that a worker's post-injury wage should be based upon ability rather than actual wages when the worker fails to put forth a good faith effort to find appropriate employment after recuperating from the injury.

(3) As indicated in the findings above, Mr. Gumm made a good faith effort to find appropriate employment. Therefore, the actual difference in pre- and post-injury wages should be used for the wage loss prong of the permanent partial general disability formula. Comparing the pre-injury wage of $454.64 to the post-injury wage of $313.84, both of which include overtime and fringe benefits, yields a 31 percent wage loss.

Although Duke's counsel is correct that it is sometimes difficult to compute an accurate post-injury wage because the average overtime figure may fluctuate, the Appeals Board believes that including both overtime and fringe benefits in the pre- and post-injury wage computation better quantifies the actual economic loss that a worker incurs than if those items were excluded.

Duke argues that Mr. Gumm's wage loss should be determined by using $8.50 per hour to compute the post-injury wage. That is the hourly rate that he initially earned while working for DOT while training for a night shift position. The Appeals Board disagrees. In an earlier decision[3], the Board held:

> The Copeland decision does, as respondent notes, refer to a good faith effort to find "appropriate" employment. The Board concludes, however, that the determination regarding what is "appropriate" employment should be a limited one. The Board does not believe the Copeland decision requires that all claimants seek the highest possible wage. Too many other factors reasonably influence a good faith decision about employment. Nor does the Board believe the Copeland decision intended for the administrative law judges or the Board to determine what employment is in the best interest of the claimant. In our view, a claimant in a workers compensation case, unable to perform his or her previous employment because of the injury, is entitled to seek new employment which is in his or her best interest, the same as any other person might, and without regard to its effect on the calculation of work disability. What the claimant should not be able to do is seek low wage employment for the purpose of enhancing the workers compensation benefits. If he/she were to do so, that would not be "appropriate" employment.

In considering all the evidence, the Board concludes that Mr. Gumm sought "appropriate" employment and has not acted in bad faith to wrongfully enhance his workers

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[3] Nelson v. Delbert Crowell, Co., Inc., Docket No. 190,485 (July 98).

compensation claim. Therefore, the actual difference in wages should be used to compute disability.

(4) The Appeals Board adopts Judge Sample's analysis and conclusions that Mr. Gumm has a 31 percent wage difference and an 83 percent task loss, which creates a 57 percent permanent partial general disability.

AWARD

WHEREFORE, the Appeals Board affirms the Award dated March 14, 1998, entered by Administrative Law Judge Julie A. N. Sample.

IT IS SO ORDERED.

Dated this ____ day of November 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Gary L. Jordan, Ottawa, KS
Mark E. Kolich, Kansas City, KS
Julie A. N. Sample, Administrative Law Judge
Philip S. Harness, Director